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Supreme Court, U.S.
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No. 88-1237

In The

Supreme Court of the United States

October Term, 1988

TRANSAMERICA-OCCIDENTAL LIFE INSURANCE COMPANY,

Petitioner,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a justiciable case or controversy present when a successor group insurer voluntarily pays the medical expenses of a group insured without obtaining a protective non-waiver agreement, reservation of rights, or other procedural protection against the prior insurer on the group risk and then sues the prior carrier (but not the insured) for repayment of the money it has voluntarily paid on behalf of the group insured.

LIST OF ALL PARTIES

The parties to this proceeding are properly listed in the style and caption of this case. A list of Transamerica-Occidental Life Insurance Company's related entities has been included in its Petition at page App. A(iv)-25. Transamerica-Occidental Life Insurance Company will be referred to in this Brief in Opposition as "Transamerica." A list of Provident Life & Accident Insurance Company's related corporations is included on page 1 of the Appendix to this Brief.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF ALL PARTIES i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

ARGUMENT IN OPPOSITION TO THE ALLOWANCE OF THE WRIT OF CERTIORARI 3

TABLE OF AUTHORITIES

Page

CASES:

Allstate Insurance Co. v. Employers Liability Assurance Corp., 445 F.2d 1278 (5th Cir. 1971) 5

Industrial Underwriters Insurance Co. v. P & A Construction Co., 382 F.2d 313 (10th Cir. 1967) 5

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 6

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 5

United Services Automobile Ass'n v. Royal-Globe Insurance Co., 511 F.2d 1094 (10th Cir. 1975) ... 3, 4, 6

RULES:

Rule 17 of the Supreme Court Rules 5

MISCELLANEOUS:

Harlan, "Manning the Dikes," 13 Record NYCBA 541 (1958) 6

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PROVIDENT LIFE & ACCIDENT COMPANY (hereinafter referred to as "Provident"), by and through its undersigned attorneys, files this its Brief in Opposition to Writ of Certiorari:

A. STATEMENT OF THE CASE

Transamerica's Statement of the Case essentially presents the procedural and factual background to this Court, with the following important exceptions:

1. Transamerica and Provident were not insurers who simultaneously had coverage for the same risk. Instead, Provident's policy covered the group health risk until April 30, 1983, and Transamerica's policy began its coverage on May 1, 1983.

2. Transamerica voluntarily began to pay the medical expenses of the employee upon the effective date of its policy and continued to do so without any reservation of rights, non-waiver agreement or other procedural agreement with Provident (or the insured) which attempted or purported to create or preserve the existence of a dispute between the parties.

3. In fact, Transamerica, by letter dated June 2, 1983, contacted the agent for the group and informed the group that it was covering the employee in question for his medical expenses.

4. In addition to not obtaining a reservation of rights or non-waiver agreement with the interested individuals and entities, Transamerica also did not commence any declaratory judgment action at any time when the medical expense payments were still accruing. Rather, the declaratory judgment action and counterclaim were not commenced until after Transamerica voluntarily had made all payments.

ARGUMENT IN OPPOSITION TO THE ALLOWANCE OF THE WRIT OF CERTIORARI

Transamerica's sole basis for jurisdiction is a claimed direct conflict of the decision below with the decision of the Tenth Circuit Court of Appeals in *United States Automobile Ass'n v. Royal-Globe Insurance Co.*, 511 F.2d 1094 (10th Cir. 1975). (For uniformity with Transamerica's argument, this case will be referred to hereinafter as "*Royal-Globe*"). While there are certain limited similarities between *Royal-Globe* and the decision before this Court, it is respectfully suggested to this Court that the cases are not in jurisdictional or any other sort of conflict. To ascertain the absence of a conflict, the circumstances of *Royal-Globe* must be briefly presented.

In *Royal-Globe*, the Tenth Circuit faced a case in which the dispute was between two liability insurers over who provided primary liability insurance coverage to the driver of a rental car, as well as the obligation to defend. The dispute was between the driver's own personal coverage and the coverage provided by the rental car's insurer to the driver of such cars. The significant difference between that case and this one is that in *Royal-Globe* one of the insurers brought a declaratory judgment action *prior* to when the defense effort had concluded and prior to when any obligation to indemnify financially was necessary. Thus, neither insurer voluntarily provided the coverage defense and the indemnity only to attempt to bring a declaratory judgment action *after* the fact of payment.

Based upon that prompt action to ascertain the insurers' rights, the Tenth Circuit determined that "each party *has* a stake in the outcome, and their interests are adverse." *Id.* at 1096 (emphasis added).

The facts and circumstances before the Eleventh Circuit in this case are very different. First, the parties before this Court were successive health insurance carriers and not simultaneous liability insurers who had to determine which company would defend (and ultimately indemnify) the driver as a result of an automobile accident.

Second, the plaintiff in *Royal-Globe*, unlike Transamerica here, sought a prompt determination of its rights and obligations *before* it found itself in a position where it had already voluntarily defended the lawsuit and paid an indemnity obligation. Transamerica paid all of the employee's medical expenses, confirmed by letter that the employee was covered by its group health plan, made no effort to obtain an agreement from Provident to this procedure, and challenged its obligation to pay only after the payment was a *fait accomplit*.

Transamerica's statement at page 13 of its Brief that the decision of the Eleventh Circuit will create some *in terrorem* concerns in our litigious society is without merit. As the court below indicated, there are ample vehicles available to companies such as Transamerica to allow them to preserve any dispute that they may have with prior insurers. Notwithstanding the availability of those devices, however, Transamerica did nothing except voluntarily pay the medical bills as they became due.

Thus, as the decision and the cases cited therein make clear, Transamerica could have (a) filed an action at the outset, joining all interested parties and litigated the dispute before it became moot through voluntary payment; or (b) obtained a full reservation of rights or non-waiver agreement from Provident and the insured prior

to making its voluntary payments, thereby preserving to a later date its right to dispute its obligation as the successor group insurer. *See Allstate Insurance Co. v. Employers Liability Assurance Corp.*, 445 F.2d 1278 (5th Cir. 1971); *Industrial Underwriters Insurance Co. v. P & A Construction Co.*, 382 F.2d 313 (10th Cir. 1967).

To be sure, a case or controversy could also have been preserved by denying all responsibility to the employee with respect to health benefits, leaving the ill employee without medical insurance. To suggest, however, that the decision of the 11th Circuit compels such a result is a broad misreading of the decision of the court below.

Rule 17 of the Supreme Court Rules provides, in pertinent part, as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> > (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . .

" 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). The Supreme Court does not sit to satisfy a scholarly interest in intellectually interesting problems nor for the benefit of particular litigants. *Id.*

The mere allegation of a conflict between federal circuits is insufficient for the granting of a writ of certiorari. There must be "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). According to Justice Harlan,

> nothing short of a difference of decision between two Courts of Appeals . . . will suffice to satisfy the 'conflict' rule . . . . Moreover, differences between the Courts of Appeal in two or more circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved . . . . [A] conflict of decisions may safely be relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved by the Supreme Court alone, and that the disagreement among the lower courts is one that should promptly be resolved.

Harlan, "Manning the Dikes," 13 Record NYCBA 541, 552 (1958).

From the above, it is respectfully suggested to this Court that while the *Royal-Globe* decision and the decision of the Eleventh Circuit below are not identical, they are not in jurisdictional conflict. Each involves a dispute between two insurers and one finds that no case or controversy exists while the other finds that constitutional jurisdiction does exist. Those limited facts do not create jurisdictional conflict, however, because the totality of the circumstances reflected in the two decisions demonstrates that the procedural posture of *Royal-Globe* was completely distinguishable from that facing the Eleventh Circuit in this case. Whatever case or controversy may have existed at one time, by the time the action was commenced

below, Transamerica had lost its jurisdictional base in federal court.

Accordingly, Provident respectfully urges that this Court deny the Petition for Writ of Certiorari presented in this case.

Respectfully submitted,

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APPENDIX

Provident is a wholly-owned subsidiary of Provident Life Capital Corporation, which is a wholly-owned subsidiary of Provident Life and Accident Insurance Company of America.

The following are subsidiaries of or affiliated with Provident:

Provident Life and Casualty Insurance Company (Tennessee) *

Provident National Assurance Company (Tennessee) *

Provident Marketing Corporation (Tennessee) *

Health Point Corporation (Tennessee) *

Health Point Preferred, Inc. (North Carolina)

Health Point Preferred, Inc. (Tennessee)

Health Point Preferred, Inc. (Maryland)

Halcyon, Ltd. (Bermuda) *

Dental One, Inc. (Georgia) *

Dental Management Services, Inc. (Delaware)

Dental Care of America, Inc. (Delaware)

DMS of Carolina, Inc. (North Carolina)

Dental Plan of America, Inc. (Maryland)

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* These corporations are wholly-owned subsidiaries of Provident.

Associated Reinsurance Corporation Company (Georgia)

Associated Intermediaries, Inc. (Georgia)

Associated Intermediaries – South Carolina, Inc. (South Carolina)

U.S. Facultative Management Corp. (New York)

Provident Properties, Inc. (Tennessee)

G.S.E.C., Inc. (Texas)